UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:21-cv-361

DISABILITY RIGHTS NORTH CAROLINA, Plaintiff, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, et al., Defendants.	**DEFENDANTS' REPLY IN SUPPORT OF THE MOTION TO DISMISS** Local Civil Rule 7.1(g)(1)

NOW COME Defendants, the North Carolina State Board of Elections, its Executive Director, and its members (collectively "State Board Defendants"), through undersigned counsel, to provide this Reply to Plaintiff's Memorandum of Law in Opposition to State Board Defendants' Motion to Dismiss. [D.E. 21].

NATURE OF THE CASE

Plaintiff, Disability Rights North Carolina ("DRNC"), claims in its Complaint that six discrete subsections of North Carolina election law place limits on who may assist an individual during the absentee voting process violate section 208 of the Voting Rights Act, 52 U.S.C. 10508 ("VRA"). [D.E. 1 ¶ 27]. As discussed at length in State Board Defendants' Memorandum of Law in Support of its Motion to Dismiss, DRNC's claim is subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) because DRNC has failed to state a claim upon which relief can be granted. None of the arguments DRNC presents in opposition to State Board Defendants' Motion to Dismiss supports a different result. [D.E. 21].

ARGUMENT

Pursuant to Local Rule 7.1(g), this Reply addresses only matters newly raised in Plaintiff's Opposition Memorandum.

First, with its arguments in favor of preemption, DRNC acknowledges, at least implicitly, the value of examining the legislative history behind a federal statute when discerning whether it was Congress's intent in passing the statute to preempt state law. DRNC does so, however, by picking and choosing those portions of Senate Report 97-417 which it contends support its argument, while minimizing that part of the Report in which the Committee plainly addressed preemption. Therein, the Report expressly asserted that "[s]tate provisions would be preempted only to the extent that they unduly burden the right recognized in [section 208.]" Senate Committee, S. Rep. 97-417, 1982 U.S.C.C.A.N. 177, 241. DRNC is correct in pointing out that "[n]owhere does the Senate Report endorse direct restriction of the rights afforded by Section 208[.]" [D.E. 21 at 12]. However, to the extent DRNC relies upon the absence of that endorsement to support its position in favor of preemption, it misapprehends the well-established law on preemption detailed in the State Board Defendants' Memorandum. [D.E. 18 at 9-11]. Simply stated, that law does not require such an endorsement for the Court to conclude a federal statute does not preempt state law. This is especially true given there is a general presumption against preemption. *See Priorities United States v. Nessel*, 487 F. Supp. 3d 599, 618 (E.D. Mich.), *rev. on other grounds*, 860 F. App'x 419 (6th Cir. 2021) (unpublished).

In light of that presumption, if anything, Congress's intent to preempt should be manifest in the federal statute's language, examined against the legislative history. *See id.* ("[T]he court finds that plaintiffs have not shown a likelihood of success on their bid to overcome the presumption against preemption."). And the opposite is the case with section 208's legislative

history, given it plainly provides "[s]tate provisions would be preempted only to the extent that they unduly burden the right recognized in [section 208.]" Senate Committee, S. Rep. 97-417, 1982 U.S.C.C.A.N. at 241.

Second, Plaintiff discourages the Court from employing the presumption against preemption, given this is a VRA case. North Carolina and other states' right to establish restrictions like those contained in the state statutes Plaintiff challenges here is derived from the states' broad power bestowed upon them by the U.S. Constitution. *See Washington. State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008). This was in fact recognized in the Senate Report on section 208 referenced above. *See* Senate Committee, S. Rep. 97-417, 1982 U.S.C.C.A.N. at 241. Where "[c]ongress legislate[s] . . . in a field which the States have traditionally occupied," as is the case with election regulation, courts start "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); *accord Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1677 (2019) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

Citing *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13-15 (2013), Plaintiff points out that the U.S. Supreme Court has previously declined to employ the presumption against preemption "[i]n the voting context." [D.E. 21 p. 3]. But, in that case, the Court did not rely on the normal presumption against preemption just because the case involved a voting issue. It did so because the case specifically concerned federal legislation passed pursuant to the U.S. Constitution's Elections Clause. which the Court recognized as having conferred a great deal of power on Congress with regards to congressional elections. *Inter Tribal Council*, 570 U.S. at 14. The Court went so far as to characterize that power as being "none other than the power to pre-

empt." *Id.* at 13-14 (noting also that the Court had "never mentioned" the presumption against preemption in its "Elections Clause cases," and concluding that there was "no compelling reason not to read Elections Clause legislation simply to mean what it says"). Even still, in *Inter Tribal,* the high court noted the states' power to regulate congressional elections was "weighty" and worthy of some amount of respect. *Id.* at 15. Despite what DRNC implies, courts have applied the presumption of correction in VRA cases. *See, e.g.*, *Priorities United States*, 487 F. Supp. 3d at 620 ("[T]he court finds that plaintiffs have not shown a likelihood of success on their bid to overcome the presumption against preemption.").

Next, DRNC contends that because determining whether a state statute "unduly burdens" the right established by section 208 is "a practical one dependent upon the facts," making that determination "would be premature at the motion to dismiss stage," even if the Court was required to do so. [D.E. 21 at 11-12 n.3 (quoting Senate Committee, S. Rep. 97-417, 1982 U.S.C.C.A.N. at 241)]. This is incorrect, particularly in light of DRNC's own allegations, or lack thereof, in its Complaint. DRNC does not assert any individualized factual allegations that the challenged statutes unduly burden the right established by section 208. In fact, without DRNC joining with individual plaintiffs, it is not clear how a fact intensive determination is even possible. Stated differently, DRNC chose to bring an associational and organizational claim based on generalized factual allegations. Section 208 turns upon the individual voter's choice of assistant. Without an individual voter involved in this case to provide a factual basis to establish an undue burden, or any burden for that matter, was imposed by state law, determining whether the state regulations here automatically impose an undue burden is a question of law. As such, the Court can at this stage directly compare the state and federal laws, and reach a dispositive determination as to whether they are in conflict.

For the reasons detailed in State Board Defendants' Memorandum supporting its Motion to Dismiss, the Court should conclude there is no conflict. To the extent any such conflict appears to exist, the burdens imposed by the state statutes challenged here are minimal at best. They are certainly not unduly burdensome, particularly in light of provisions like the blanket exception contained in N.C.G.S. § 163-230.2(e1), which is mirrored upon section 208. N.C.G.S. § 163-230.2(e1) (2019) ("If a voter is in need of assistance completing the written request form due to blindness, disability, or inability to read or write and there is not a near relative or legal guardian available to assist that voter, the voter may request some other person to give assistance[.]").

The statutes challenged here clearly do not unduly burden the right establish in section 208. In accordance with that section's legislative history, the challenged statutes are therefore not preempted. Even if the Court were to disregard the "unduly burden" analysis, there is still support for the conclusion that Congress did not intend to preempt. The challenged statutes are also not preempted because, as demonstrated by their plain language, their purpose is aligned with the "ultimate touchstone" in all preemption cases, Congress's purpose in passing the subject federal legislation, section 208. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494 (1996) (citation omitted). Moreover, with section 208, Congress did not grant voters a choice of assistants for the sake of choice alone, as DRNC seemly argues in portions of its Opposition Memorandum. Congress did so because it recognized that "[c]ertain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance[,]" and "[b]ecause of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated." S. Rep. 97-417, 1982 U.S.C.C.A.N. at 240.

As discussed in State Board Defendants' Memorandum, the purpose behind section 208, to protect vulnerable populations from manipulation and undue influence, is the same purpose

behind all the state statutes DRNC challenges. DRNC faults State Board Defendants for failing to support their assertions regarding the purpose for the challenged state statutes in their Memorandum. But that purpose is, as State Board Defendants' discussion in its Memorandum indicated, manifest in the statutes' plain language. Under those statutes, the wide pool of assistants from which a voter can choose contains those who in most cases are in positions of trust with the voter or who are neutral. *See, e.g.,* N.C.G.S. § 163-230.2 (referencing the voter's "near relative," "verifiable legal guardian," and "a member of a multipartisan team trained and authorized by the county board of elections"). And one of the statutes prohibits assistance from those apt to assert undue influence. *See* N.C.G.S. § 163-226.3(a)(4) (2019) (excluding medical personnel at the facility where the voter resides and political officeholders). Undoubtedly, the purpose of these statutes is not, as DRNC implies, to frustrate section 208's purpose to protect vulnerable populations from manipulation and undue influence, but to do the same.

The Senate Report does express, as DRNC points out, the belief that having a choice of assistants "is the only way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter." S. Rep. 97-417, 1982 U.S.C.C.A.N. at 241. However, it is immediately after noting this that the report recognized "the legitimate right of any state to establish necessary election procedures, subject to the overriding principle that such procedures shall be designed to protect the rights of voters[,] and "[s]tate provisions would be preempted only to the extent that they unduly burden the right recognized in this section[.]" *Id.*

Finally, DRNC relies extensively upon a case issued by the Middle District, *Democracy N.C. v. N.C. State Bd. Of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020), which should have no bearing on the decision here, primarily because it is distinguishable. In *Democracy N.C.*, the plaintiffs challenged N.C.G.S. §§ 163-226.3(a)(4)-(6), 163-230.2(e)(4), and 163-231(b)(1) on

several grounds, including that the statutes violate section 208 of the VRA. *Democracy N.C.*, 476 Supp. 3d at 233. The court in *Democracy N.C.* did conclude it was "satisfied" that North Carolina's laws regarding who can assist voters with absentee voting violated section 208 for the purpose of deciding whether to ground injunctive relief. *Id.* at 235. However, it did so while considering the unusual facts of that case. *Id.* More specifically, it was significant to the court in *Democracy N.C.* that the one plaintiff in that case with standing to challenge the absentee voting restrictions was in a nursing facility and wanted his wife to come in to help him, but because of the COVID-19 pandemic, the plaintiff's facility, like many others, was "locked down and [would] likely continue to have restricted access for the foreseeable future[.]" *Id.* The court concluded "208-voters in these type of adult care facilities may only come into contact with 'an owner, manager, director, [or] employee' of their residence and therefore may not have any options for assistance." *Id.* (quoting N.C.G.S. § 163-226.3(a)(4)). As discussed above, Plaintiff here, DRNC, has not alleged anything close to these facts, nor can it.

And, at bottom, for the reasons stated herein and in State Board Defendants' Memorandum, *Democracy N.C.* was incorrectly decided, and neither that order, nor any other federal district court decision cited by DRNC, is binding on this Court.

For all other arguments by DRNC not directly addressed above, the State Board Defendants rely on their initially filed Memorandum of Law.

CONCLUSION

For the reasons discussed above and those stated in the Memorandum of Law in Support of the Motion to Dismiss, the State Board Defendants respectfully request that Plaintiff's Complaint be dismissed with prejudice.

This the 20th day of December, 2021.

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